



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 10 2008

**Kevin Finnegan
Levy Ratner
80 Eighth Avenue
New York, New York 10011-5126**

**RE: MUR 5970
1199 SEIU and 1199 SEIU Federal PAC
and Patrick Gaspard, in his official
capacity as Treasurer**

Dear Mr. Finnegan:

On February 14, 2008, the Federal Election Commission notified your clients, 1199 SEIU and 1199 SEIU Federal PAC (collectively "SEIU"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 22, 2008, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe SEIU violated 2 U.S.C. § 441a(a)(1). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in black ink that reads "Julie K. McConnell/eip".

**Julie K. McConnell
Assistant General Counsel**

**Enclosure
Factual and Legal Analysis**

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2 **FEDERAL ELECTION COMMISSION**

3 **FACTUAL AND LEGAL ANALYSIS**
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5 **RESPONDENTS:** 1199 SEIU and 1199 SEIU Federal PAC MUR: 5970
6 and Patrick Gaspard, in his official capacity as Treasurer
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9 **I. INTRODUCTION**
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11 This matter was generated by a complaint filed with the Federal Election Commission by
12 Lori Sherwood. See 2 U.S.C. § 437g(a)(1).
13

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 The complaint alleges that 1199 SEIU United Healthcare Workers East ("1199 SEIU")
16 and Donna Edwards for Congress ("Committee") may have "collaborated" in the dissemination
17 of campaign literature. The complaint also alleges that candidate Edwards and Anna Burger, the
18 SEIU national political head, co-founded They Work For Us, Inc.

19 1199 SEIU states that the 1199 SEIU Federal Political Action Fund ("1199 SEIU PAC")
20 produced, paid for and mailed literature in support of Edwards' 2008 campaign as part of an
21 independent expenditure effort. The PAC treasurer attests that no one associated with 1199
22 SEIU discussed the literature with Edwards or anyone affiliated with the campaign and that there
23 is a firewall in place. The treasurer checked with the literature vendor to confirm that the vendor
24 had no contract or contact with the Edwards Committee. The only contact the treasurer had with
25 Edwards was to tell her about 1199 SEIU's endorsement of her. Furthermore, the treasurer states
Anna Burger is not associated with the 1199 PAC.

1 The Act, as amended by BCRA, provides that no person shall make contributions to any
2 candidate and his or her authorized political committee with respect to any election for federal
3 office, which, in the aggregate, exceed \$2,300. 2 U.S.C. § 441a(a)(1)(A).

4 Under the Act and Commission regulations, the terms “contribution” and “expenditure”
5 include any gift of money or “anything of value” made by any person for the purpose of
6 influencing a Federal election. *See* 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i); 11 C.F.R. §§
7 100.52(a) and 100.111(a). The phrase “anything of value” includes all in-kind contributions. *See*
8 11 C.F.R. §§ 100.52(d)(1) and 100.111(e)(1). In-kind contributions include expenditures made
9 by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a
10 candidate, a candidate’s authorized committees, or their agents. 2 U.S.C. § 441a(a)(7)(B)(i).

11 Commission regulations specify a three-prong test to determine whether a payment for a
12 communication becomes an in-kind contribution as a result of coordination between the person
13 making the payment and a candidate. *See* 11 C.F.R. § 109.21(a)(1)–(3). Under the first prong of
14 the coordinated communication test, the communication must be paid for by a person other than
15 a candidate, a candidate’s authorized committee, a political party committee, or agents of any of
16 the foregoing. *See* 11 C.F.R. § 109.21(a)(1). Under the second prong, the communication must
17 satisfy one of the four content standards set forth in 11 C.F.R. § 109.21(c).¹ Under the third

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court’s invalidation of the fourth, or “public communication,” content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission’s content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties’ motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, ___ F.3d ___, (D.C. Cir. 2008).

1 prong, the communication must satisfy one of the five conduct standards set forth in 11 C.F.R.

2 § 109.21(d).²

3 The complaint's broad legal conclusion that 1199 SEIU and 1199 SEIU PAC
4 "collaborated" is not supported by facts. Moreover, 1199 SEIU and 1199 SEIU PAC have set
5 forth that there was no communication with Edwards or her campaign regarding the literature,
6 and that the vendor had no contact with them either. Thus, it appears that the conduct standard of
7 the coordination regulations has not been met. See 11 C.F.R. § 109.21(d). Therefore, there is no
8 reason to believe that 1199 SEIU and 1199 SEIU PAC and Patrick Gaspard, in his official
9 capacity as Treasurer, violated 2 U.S.C. § 441a(a)(1) by making an excessive in-kind
10 contribution in the form of a coordinated communication.

² The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. See 11 C.F.R. § 109.21(d).